

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY ALAN JENKINS,

Defendant-Appellant.

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UNPUBLISHED

May 9, 2013

No. 311486

Bay Circuit Court

LC No. 11-010649-FH

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant of domestic violence, third offense, MCL 750.81(4). The trial court also found defendant twice in contempt of court, MCL 600.1715. The court sentenced defendant as a third felony offender, MCL 769.11, to a prison term of 32 to 48 months, to be served consecutively with prison terms of 93 days for each contempt conviction. Defendant appeals as of right. We affirm.

The police responded to a call about a “threat” situation involving defendant, the victim, and the victim’s father. Two conflicting versions of events emerged at trial. The victim and defendant testified that they were having a conversation regarding one of their children when the victim’s father showed up. Both indicated that there was no argument or physical aggression until the father arrived, but that an argument then ensued between defendant and the victim’s father. The victim denied making several statements to police that conflicted with her trial testimony.

The victim’s father testified that the victim called him because she was afraid that defendant would show up at her home and cause problems. He went to the victim’s house where defendant was already present and arguing with the victim. Defendant would not leave when asked, made threatening gestures toward the victim, and said he had a gun, at which point the father called 911. The responding officer testified that the victim initially made statements consistent with this version of events.

Defendant argues that reversal is required because the prosecutor committed several acts of misconduct, and that defense counsel was ineffective for failing to object to the prosecutor’s misconduct. Because defendant failed to object to the prosecutor’s conduct at trial, his claim of prosecutorial misconduct is unpreserved and our review is limited to plain error affecting defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664

(2008). Thus, reversal is necessary only if a timely instruction could have been inadequate to cure any defect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Because defendant also failed to raise an ineffective assistance of counsel claim in the trial court, we limit our review of this claim to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Defendant first argues that the prosecutor erroneously elicited several hearsay statements from the responding officer and the victim's father. We disagree. The responding officer testified about the victim's initial statement. The victim had denied making the statements to the officer. The statements were not being offered to prove the truth of the matter asserted, MRE 801(c), but to impeach the victim's credibility. MRE 607 allows any party, including the party that called the witness, to impeach that witness's credibility. Furthermore, the statements did not violate defendant's right of confrontation because the victim testified and denied making the statements and defendant had the opportunity to cross-examine her. With regard to the testimony of the victim's father regarding contact between the victim and defendant after the incident, this testimony was not offered to prove that there was contact between the victim and defendant but, rather, to impeach the victim who denied having any contact with defendant after the incident. Additionally, apart from testimony that the victim had advised him that she got a car from defendant after the incident, the statements were based on the father's personal knowledge and were therefore not hearsay.

Defendant also asserts that the prosecutor improperly questioned him regarding a conviction for carrying a concealed weapon conviction. However, defendant opened the door during the cross-examination when he said, "I did a lot of time for being in possession of a firearm 15 years ago." Defendant himself informed the jury he had been convicted of possessing a weapon before the prosecutor even questioned defendant about it. Defendant cannot claim error where he contributed to the error either by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 633 NW2d 499 (2003).

Next, defendant, relying only on MRE 404(b), contends that the prosecution erroneously introduced photographs of the victim after defendant allegedly beat her in 2005 and improperly questioned defendant about previous acts of domestic violence.<sup>1</sup> However, MCL 768.27b provides in pertinent part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose which it is relevant, if not otherwise excluded under Michigan rule of evidence 403." Both the pictures of the victim and the testimony of defendant's previous domestic violence convictions were admissible under MCL 768.27b.<sup>2</sup>

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<sup>1</sup> Defendant mentioned the previous domestic violence before the prosecutor questioned defendant on the acts. Thus, even if error, no relief would be available because defendant contributed to the error either by plan or negligence. *Gonzalez*, 256 Mich App at 224.

<sup>2</sup> Defendant does not address MCL 768.27b.

Finally, defendant argues that the prosecutor committed misconduct by eliciting irrelevant testimony from defendant about an incident where defendant was allegedly standing outside a house yelling for the victim. Defendant did not deny the incident but did not remember the specific incident and instead said that he has stood outside plenty of houses and screamed for the victim. MRE 401 provides that evidence is relevant if it has any tendency to make a fact of consequence more or less likely. Defendant's relationship with the victim and how he acted toward her would make a fact of consequence more or less likely, mainly whether defendant was inclined towards domestic violence. Evidence that defendant stood outside numerous homes yelling and screaming for the victim was relevant to how he treated her and was some evidence that he did not treat her with respect and verbally abused her, a fact which would be relevant to whether he would be more or less likely to commit the alleged crime in this instance. Therefore, the prosecutor did not err in eliciting the testimony.

Defendant also argues that the prosecutor erred in questioning defendant about specific instances of conduct and that it was unfairly prejudicial to question him about police reports that had been filed over the years. However, the prosecutor never mentioned that the instances were based on police reports and, as discussed above, defendant's behavior toward the victim was relevant to the charged crime. All the specific instances the prosecutor asked defendant about related to the victim and defendant's interactions with her. Also, the way defendant treated other women in the victim's presence would make it more or less likely that defendant was prone to violence against the victim. The evidence was relevant and the prosecutor did not commit misconduct by questioning defendant on the specific instances of conduct.

Because the prosecutor did nothing inappropriate, defense counsel was not ineffective for failing to object to the prosecutor's conduct. See *Thomas*, 260 Mich App at 457 ("Counsel is not ineffective for failing to make a futile objection.").

Affirmed.

/s/ Karen M. Fort Hood  
/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell